89-711

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1989

UNIVERSAL FABRICATORS, INC.
Petitioner

VERSUS

CARL SMITH AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HOWARD L. MURPHY
OF
DEUTSCH, KERRIGAN & STILES
755 MAGAZINE STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE: (504) 581-5141
COUNSEL FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

116 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether land-based work as a structural fitter for the construction of a stationary offshore platform constitutes "maritime employment" under 33 U.S.C. §902(3) of the Longshore and Harbor Workers' Compensation Act ("LHWCA").

II. Whether a worker who is not performing activities on the navigable waters must establish that such activities bear a "direct" or "significant" relationship to maritime commerce in order to satisfy §902(3)'s status requirement.

III. Whether the Court of Appeals erred as a matter of law by failing to apply the LHWCA jurisdictional parameters set down in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985).

IV. Whether a stationary platform is a covered situs under 33 U.S.C. §903(a).

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UNIVERSAL FABRICATORS, INC.
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner, Universal Fabricators, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 31, 1989.

DECISIONS BELOW

The opinion of the Court of Appeals is reported at 878 F.2d 843. The decisions of the Benefits Review Board and the administrative law judge are reported at 21 BRBS 83 (BRB) and 20 BRBS 707 (ALJ) respectively.[1]

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[1] All three opinions are contained in the appendix.

JURISDICTION

This court's jurisdiction is invoked under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* and 28 U.S.C. §1254(1).

STATUTES INVOLVED

This petition concerns the following LHWCA provisions as they existed prior to the 1984 amendments:

1. §2(3), 44 Stat. 1424, amended 86 Stat. 1251, 33 U.S.C. §902(3):

   > The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

2. §3(a), 44 Stat. 1426, amended 86 Stat. 1251, 33 U.S.C. §903(a):

   > . . .[C]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

Carl Smith injured his back on April 30, 1982 while working as a structural fitter on a stationary or "fixed" offshore platform that was under construction in Universal Fabricators' yard in New Iberia, Louisiana. The injury occurred when Smith lifted a steel plate that was to become part of the platform's floor.[2]

When Universal hired Smith in January 1981, he was assigned to perform fitting work on an oil drilling barge, the only vessel Universal ever built. His participation in that project ended on July 14, 1981, when the barge was completed. Thereafter, Smith worked on several fixed platforms or fabricated platform components, such as helipads and living quarters. In between these assignments, Smith fabricated a stinger for a pipe laying barge. On February 16, 1982, Smith returned to platform fabrication work, which he continued to do uninterrupted through the date of injury, except for one day, several weeks earlier, when he welded a walkway for an elevator boat.

Smith, who was paid compensation under the Louisiana Worker's Compensation Act (La. R.S. 23:1021, *et seq.*) from the date of injury, filed a claim for LHWCA benefits on February 22, 1985. Universal controverted the claim on the grounds that Smith's work was non-maritime and therefore not covered by the LHWCA. The claims examiner agreed and denied Smith's request.[3]

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[2] This platform is the same as the structures considered by this Court in *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969) and *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Upon completion, the platform was transported to a Texasgulf Oil & Gas Company site in the Gulf of Mexico, approximately 40 miles off the Texas coast.

[3] Memorandum of Informal Conference, Appendix D, A-27.

Smith thereafter tried his claim to an administrative law judge, who found that Smith satisfied the status and situs requirements for jurisdiction and ordered Universal to pay LHWCA benefits from the date of injury, minus those amounts Smith had already received in state compensation.[4] In concluding that coverage existed, despite finding that Smith's injury "did not occur at the locus of a maritime activity," the ALJ placed complete reliance on this court's opinion in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977) and the statement that "persons who spend at least some of their time in indisputably longshoring operations are considered 'longshoremen' and are covered." *Smith v. Universal Fabricators, Inc.*, 20 BRBS 707, 711 (ALJ).

On appeal by Universal to the Benefits Review Board, the BRB acknowledged that Smith's fabrication of fixed platforms during the last several months of his employment was an activity not covered by the LHWCA. *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83, 85 (BRB).[5] Nevertheless, the BRB refused to reverse the ALJ's finding in favor of status, since Smith had repaired or fabricated parts for drilling vessels at other times during his employment. *Id.*

The Court of Appeals subsequently reviewed the BRB's order and affirmed.[6] It held that no "direct involvement" in a maritime activity was needed to sustain status and that this could be based "either upon the maritime nature of the claimant's activity at the time of injury or

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[4] Appendix C, A-17

[5] Appendix B, A-9.

[6] Appendix A, A-1

upon the maritime nature of his employment as a whole." *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 845 (5th Cir. 1989).

REASONS FOR GRANTING WRIT

What the decision below has done is apply the LHWCA to an accident that arose from admittedly non-maritime employment and which "did not occur at the locus of a maritime activity." Furthermore, the Fifth Circuit based this application on a misappreciation of this Court's holding in *Northeast Marine Terminal Co. v. Caputo, supra*, with regard to the requirements for both status and situs.

I. Direct Maritime Relationship Needed For LHWCA To Cover Land-Based Activity Not Named In The Act

Universal is petitioning for certiorari on the substantial question of whether land-based work activities, not explicitly enumerated in the LHWCA, must have a "direct" or "significant" relationship to navigation or maritime commerce in order to satisfy the "engaged in maritime employment" requirement under §902(3). If so, then Smith's work on a fixed platform should preclude coverage.

In *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983), this Court noted that its two prior decisions, in which it discussed the landward reach of the LHWCA's 1972 Amendments, *Caputo, supra*, and *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979), left this issue unresolved. 459 U.S. at 318, n.27, 103 S.Ct. at 647, n.27. In *Caputo* and *Pfeiffer*, the claimants fit one of the categories explicity described under the Act as "maritime employment." Such is not the case here, thus making this issue ripe for consideration by this Court.

II. Fifth Circuit's Rejection of "Directly Involved" Requirement Conflicts With Six Other Circuits

Prior to *Smith,* Fifth Circuit precedent held that an employee is covered if at the time of injury he was (1) performing the work of loading, unloading, repairing, building or breaking a vessel, or (2) although he was not actually carrying out these specified functions, he was "directly involved" in such work. *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 539-40 (5th Cir. 1976); certiorari granted, judgments vacated and case remanded 433 U.S. 904, 97 S.Ct. 2966-67, 53 L.Ed.2d 1088; reaffirmed 575 F.2d 79; restored to calendar for reargument 441 U.S. 930, 99 S.Ct. 2048, 60 L.Ed.2d 658; affirmed 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225. The *Smith* panel overturned *Perdue* claiming that *Caputo* modified its requirement of "direct involvement" in a maritime activity.

The Fifth Circuit's eradication of this requirement is in conflict with six other circuits. Four require that an injured employee's activity either "directly further" or be a "necessary ingredient" of the loading, or unloading, or shipbuilding process. *See General Dynamics Corp. v. Sacchetti,* 681 F.2d 37, 39 (1st Cir. 1982) (claimant was a shipbuilder engaged in maritime employment because his function was a "necessary ingredient" or an "integral part of" the shipbuilding process); *Dravo Corp. v. Banks,* 567 F.2d 593, 595-96 (3rd Cir. 1977) (in order to be covered, claimant's job should have been a "necessary ingredient" in the shipbuilding process); *Caldwell v. Ogden Sea Transp., Inc.,* 618 F.2d 1037, 1050 (4th Cir. 1980) (a claimant asserting harbor-worker status must be "directly involved" in the work of shipbuilding and a claimant asserting longshoreman's status must be an "integral part" of the unloading process); *Sanders v. Alabama Dry Dock & Shipbuilding Co.,* 841 F.2d 1085, 1088 (11th Cir. 1988) (the pro-

per focus should be whether the purposes served in applying the job skills "directly relate" to furthering shipyard concerns). Two other circuits require that an injured employee's work have a "realistically significant relationship to navigation or commerce on navigable waters." *See Fusco v. Perini North River Assocs.*, 622 F.2d 1111, 1113 (2nd Cir. 1980), cert. den. 449 U.S. 1131; *Weyerhauser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1976), cert. den. 429 U.S. 868.

By discarding the "directly involved" requirement, the Fifth Circuit has extended "maritime employment" beyond the bounds established by Congress and opened the door to coverage of purely land-based activities. Because its holding conflicts with six other circuits, this Court should grant certiorari to rectify the split, and to give guidance to the courts and Gulf coast fabrication employers on whether a worker, like Smith, who is injured while performing non-maritime work is entitled to LHWCA coverage.

III. Fifth Circuit's Holding Misconstrues *Caputo* And Conflicts With Its Own Prior Interpretation

The only explanation offered by the Fifth Circuit for rejecting the "directly involved" requirement was this Court's statement in *Caputo*:

> . . . that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend *at least some of their time in indisputably longshoring operations* and who, without the 1982 (sic) Amendments, would be covered for only part of their activity.[7]

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[7] *Universal Fabricators*, 878 F.2d at 845.

The statement must be considered in the context in which it was made. *Caputo* was the first time this Court considered the 1972 Amendments. In recognition of the newly expanded situs under §903(a), it held that a worker performing longshoring activities in an area adjoining navigable waters was entitled to LHWCA coverage just as if he had performed the same activities on the water. Contrary to the Fifth Circuit's "expansive" interpretation, *Caputo* did not hold that an employee injured while engaged in an activity outside the "overall process of loading or unloading a vessel" is covered.

The Fifth Circuit's reasoning for dispensing with the "directly involved" relationship becomes even cloudier when the history of *Perdue* is examined. *Perdue* involved five consolidated claims, two of which were ultimately reviewed by this Court under the caption *P.C. Pfeiffer Co. v. Ford, supra.* When certiorari was first sought, this Court vacated and remanded the case to the Fifth Circuit with instructions to reconsider its opinion in light of *Caputo. See* 433 U.S. 904, 97 S.Ct. 2966-67, 53 L.Ed.2d. 1088. On remand, 575 F.2d 79, the Fifth Circuit reaffirmed stating:

> We find that our prior resolution of the coverage issues presented in each of these cases is consistent with the rationale expressed in *Caputo,* and, accordingly, we reaffirm our prior determinations as to the benefit eligibility of the affected maritime employees under the Act.[8]

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[8] 575 F.2d at 80.

By reaffirming, the Fifth Circuit confirmed that its direct involvement requirement was consistent with this Court's holding in *Caputo*. This Court granted certiorari a second time and affirmed, thereby leaving the direct involvement requirement intact. Now, without any further pronouncement on LHWCA jurisdiction from this Court that would suggest a contrary result, the Fifth Circuit in an abrupt about-face has held that *Caputo* is at odds with *Perdue*.

Clearly, the Fifth Circuit has misconstrued *Caputo* as well as overlooked its prior precedent. *Caputo* does not control the issue here, inasmuch as it has never been addressed, as the majority opinion recognized in *Perini, supra*. This Court therefore should grant certiorari to clarify the meaning of *Caputo* and to decide what role, if any, it should play in the resolution of status questions for claims arising out of non-maritime work.

IV. Uniformity Requires That *Herb's Welding* Be Extended To Platforms While Situated On Land

This Court held in *Herb's Welding v. Gray, supra*, that the LHWCA has no connection to a fixed platform in state territorial waters and refused to extend coverage to an employee injured while welding a gas line on a platform within Louisiana's coastal waters. The majority emphasized that platforms are "artificial islands" and are "not even suggestive of traditional maritime affairs." *Id.*, 470 U.S. at 421-22, 105 S.Ct. at 1426.

Smith's case is much less compelling than Gray's. Those considerations which the dissent argued should sustain a finding of maritime employment, i.e., that Gray frequently traveled by vessel from one platform to another and that platforms are more like piers than islands, are not

factors in Smith's case. *Id.*, 470 U.S. at 444-51, 105 S.Ct. 1438-41. All of Smith's platform work took place on land inside of Universal's yard. His duties consisted of cutting metal plates and fitting them on the platform. His overall activities were no different than a structural fitter assisting in the construction of an industrial plant in a landlocked state. Finding status in this instance is contrary to *Herb's Welding* and its holding that fixed platforms, by their purpose and design, have no functional relationship to maritime employment.

Herb's Welding left undecided whether a fixed platform can satisfy the Act's situs requirement (470 U.S. at 427, 105 S.Ct. at 1429), although in *Miles v. Delta Well Surveying Corp.*, 777 F.2d 1069 (5th Cir. 1985) the Fifth Circuit held that a fixed platform within state territorial limits fails the situs test. This case invites review of that issue. In terms of uniformity and predictability, there is much to say in favor of treating the platform as the situs and little to say about the rather illogical assumption below that the injury happened upon the extended navigable waters. The platform was the situs of the work as well as the place of injury. As a definable area, it could and should have been the focus of §903(a).

Certiorari therefore is warranted to resolve whether a platform constitutes a covered situs and to decide whether the scope of *Herb's Welding* should be enlarged beyond state territorial waters to include platforms, which during the construction process, are situated on land.

CONCLUSION

This Court stated in *Herb's Welding*, "there will always be a boundary to coverage, and there will always be

people who cross it during their employment." *Supra*, 470 U.S. at 426, 105 S.Ct. at 1429. Smith can hardly be likened to a "paradigmatic longshoreman." *Id.*, 470 U.S. at 427, n.13, 105 S.Ct. at 1429, n.13. He was not moving between a vessel and pier or other adjoining area on a daily or even weekly basis. For two and a half months before his injury, he was engaged in fixed platform construction. Congress' admonition that it did not intend to cover employees, who are not engaged in the "essential elements" of loading, unloading, repairing or building a vessel, has no meaning if the Act covers Smith for an injury sustained in an indisputably non-maritime activity.[9]

By amending the LHWCA in 1972, Congress intended that longshoring operations, which took place on water and had always been covered before 1972, and could thus be described as "indisputable", would be covered on land within the areas outlined under §903(a). *See Caputo,* 432 U.S. at 273, 97 S.Ct. at 2362. Congress did not direct that an employee, who had engaged in a maritime activity during an earlier period in his employment, would be covered for an injury resulting from subsequent involvement in non-maritime work.

The Fifth Circuit's decision expands the LHWCA beyond its permissible elasticity and eliminates that all important thread between a worker's activities and maritime commerce upon which application of the LHWCA turns. Six circuits require that a worker's activities be an "integral part" of the longshoring or shipbuilding process, or that such activities have a "direct" or "significant" relationship to navigation or maritime commerce. In affirming Smith's award, the Fifth Circuit, by virtue of its misap-

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[9] House Report No. 92-1441, U.S. Code Cong. & Ad. News, 92d Congress, 2d Sess., 4698, at 4704-08.

plication of *Caputo,* dispensed with this critical element. It incorrectly found LHWCA coverage where none should exist and, in so doing, placed itself in direct conflict with its sister circuits and the rationale of this Court's decision in *Herb's Welding.*

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

S/HOWARD L. MURPHY

HOWARD L. MURPHY
DEUTSCH, KERRIGAN & STILES
755 MAGAZINE STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE: (504) 581-5141
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that this pleading has been served on all parties through their counsel of record, Larry Thomas Richard, Cline, Miller & Richard, Post Office Drawer 29, Rayne, Louisiana 70578; and Janet R. Dunlop, U.S. Department of Labor, Office of the Solicitor, Frances Perkins Building, Suite N-2620, 200 Constitution Avenue, N.W., Washington, D.C. 20210, by depositing three copies of same in the United States mail, postage prepaid and properly addressed, this 30th day of October, 1989.

S/HOWARD L. MURPHY

HOWARD L. MURPHY

APPENDIX A

UNIVERSAL FABRICATORS, INC. v. SMITH
5116

UNIVERSAL FABRICATORS, INC., Petitioner,

v.

Carl SMITH and Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Respondents.

No. 88-4458.

United States Court of Appeals,
Fifth Circuit.

July 31, 1989.

Employer petitioned for review of order of Benefits Review Board awarding employee benefits under Longshore and Harbor Workers' Compensation Act. The Court of Appeals, Gee, Circuit Judge, held that: (1) both status and situs requirements of Act were satisfied, and (2) state unemployment compensation payments tolled statute of limitations.

Affirmed.

Petition for Review of an Order of the Benefits Review Board.

Before GEE, SMITH, and DUHE, Circuit Judges.

GEE, Circuit Judge:

Background

In 1982 the respondent, Carl Smith, suffered a back injury while working as a structural fitter for Universal Fabricators, Inc. In 1985 he brought an action under the Longshore and Harbor Workers' Compensation Act (LHWCA) for benefits. The Administrative Law Judge (ALJ) found that the status, situs and filing requirements of the LHWCA were met and ordered Universal to pay LHWCA benefits from the date of the injury, minus amounts Smith had received in state compensation payments.

Universal appealed to the Benefits Review Board, which affirmed the decision of the ALJ. In accord with 33 U.S.C. § 921(c), Universal has appealed to this Circuit.

Facts

Smith was hired by Universal Fabricators, Inc. in January of 1981 and worked as a structural fitter until April 30, 1982, the date on which he injured has back while setting a piece of floor plating. The parties agree that the respondent is permanently disabled as a result of this accident.

The ALJ found that the respondent worked all or part of the following days on the projects listed below:

126 days building a draining barge for the vessel Scan-Drill;
103 days building or repairing fixed platform components;
66 days fabricating stingers;[1]

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[1] Stingers are devices attached to vessels which lay pipe in the Gulf of Mexico.

> 5 days repairing a drilling tender;
> 4 days installing rubber bumpers on barge bumpers;
> 2 days fabricating a walkway for a jack-up barge.

In addition, company records show the respondent spent five days loading barges, although respondent testified that those records were mere estimates made by foremen and were often inaccurate. He stated that he worked on loading operations for at least two months. All the activities in which the respondent was engaged were performed at the employer's yard. The ALJ found the situs requirement was therefore satisfied.

The respondent has not worked since the accident but has received weekly compensation benefits under the Louisiana Worker's Compensation Act.

Analysis

I. *The Status Requirement of the LHWCA.*

A two-pronged test determines whether an injured worker falls under the provisions of the Longshore and Harbor Workers' Compensation Act. The claimant must satisfy both the status (33 U.S.C. § 902(3)) and situs (33 U.S.C. 903(a)) requirements of the statute. The status requirement states:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker. . . .

33 U.S.C. § 902(3).

[1] The petitioner asserts that the Benefits Review Board erred in finding the respondent an "employee"- covered by the act. According to the petitioner, the Board specifically failed to apply the holding of *Jacksonville Shipyards, Inc. v. Skipper,* 539 F.2d 533 (5th Cir.1976) to the respondent's claim for recovery under the LHWCA. Skipper stated that:

> Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not necessarily carrying out these specified functions, he was "directly involved" in such work.
>
> *Id.* at 539-40.

The petitioner argues that the respondent cannot be included in the class of employees covered by the LHWCA because he was not engaged in maritime activities when he was injured, although he had been involved in such activities at an earlier date. Skipper, who had been a welder for many years, was engaged in non-maritime activities on the day he was injured and was therefore unable to recover under the LHWCA. *Skipper, supra,* at 542.

The argument, however, fails to consider the United States Supreme Court's later holding in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). The Court in *Caputo* stated:

> It is clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend *at least some of their time in indisputably longshoring operations* and who, without the 1982 Amendments, would be covered for only part of their activity.

Id. at 273, 97 S.Ct. at 2362 (emphasis added).

The respondent and the Director of the Benefits Review Board maintain that the status requirement is satisfied because a *major* portion of the claimants time was spent in "maritime employment". In *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir.1981), we held:

> In addition, employee status may be based *either* upon the maritime nature of the claimant's activity at the time of his injury *or* upon the maritime nature of his employment as a whole.
>
> *Id.* at 754.

See, also, Thornton v. Brown & Root, 707 F.2d 149, 152 (5th Cir.1983); *Schwabenland v. Sanger Boats*, 683 F.2d 309, 312 (9th Cir.1982); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 844 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979).

The Benefits Review Board found that a significant portion of the respondent's time was spent in indisputably longshore operations; and since substantial evidence exists to support this finding, we will not disturb it. *See Hullingshorst, supra*, at 753. Our holding in *Skipper* has been modified both by the Supreme Court's holding in *Caputo* and by our own decisions subsequent to *Skipper. See, e.g., Hullinghorst, supra*, at 754. The Board's decision that the respondent satisfies the status requirement is therefore affirmed.

II. *The Situs Requirement of the LHWCA.*

This is provided by 33 U.S.C. § 903(a):

> (a) Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any *adjoining* pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area* customarily used by an employer in loading, unloading, *repairing,* dismantling, or *building* a vessel).

Id. (emphasis added).

[2] Whether the situs requirement is met in this case is contested by the parties, partly on the basis of our panel's holding in *Mills v. Director, Office of Worker's Compensation Programs,* 846 F.2d 1013 (5th Cir.1988), that a land based welder could recover under the LHWCA for injuries that occurred to him while working on shore fabricating a platform destined for the outer continental shelf. *Id.* at 1014.[2] The instant case does not arise under OCSLA, and despite some factual similarities between *Mills* and the instant case, 43 U.S.C. § 1331(1) of the Outer Continental Shelf Lands Act does not control disposition of the situs requirement.

Applying *Caputo's* situs requirement in the instant case, the ALJ found that the employer's yard *adjoined* the navigable waters of the United States and the situs requirement was satisfied. The appellant's argument that land-based workers should not be covered by the LHWCA is overbroad, and conflicts with the statutory language of § 903(a). Since the respondent was engaged in maritime activities in an area adjoining the water, the Board's result must be affirmed.

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[2] Since the close of briefing in this case *Mills* has been reversed by our Court, sitting en banc. 877 F.2d 356 (5th Cir.1989).

III. *The Statute of Limitations.*

[3] The final issue is whether the respondent's claim is barred by the statute of limitations stipulated in 33 U.S.C. § 913:

> (a) Except as otherwise provided in this section, the right to compensatiion for disability or death under this chapter shall be barred unless a claim therefor is filed within one year after the injury or death. If payment of compensation had been made without an award . . . a claim may be filed within one year after the date of the last payment . . . .
>
> (b)(1) Notwithstanding the provisions of subsection (a) of this section failure to file a claim within the period prescribed in such subsection shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

Universal argues that the operative words of the statute, "payment of compensation without an award," are not met by payment of state compensation and that respondent's failure to file a claim until almost three years after the accident bars the action. In support of this argument, the petitioner cites *Windrem v. Bethlehem Steel Corp.*, 293 F.Supp. 1 (D.N.J.1968). In *Windrem*, however, the plaintiff had already won an award under the state compensation system when he filed for compensation under the LHWCA. *Id.* at 3. The court simply refused to allow the plaintiff to categorize the payments under the award as "voluntary payments" and bootstrap himself into an extension of the one year statute of limitations. *Id.* at 4. In fact, the court stated the obvious truth: such payments are not voluntary when ordered by a court. *Id.*

The respondent argues that the petitioner voluntarily agreed to pay the respondent's state worker's compensation benefits from the date of the accident, triggering the extension.

The Board stated that payments an employer makes under state worker's compensation acts toll the statute of limitations for filing under their decision in *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1978). *See also, Lilton Systems, Inc. v. Hollinhead*, 571 F.2d 272 (5th Cir. 1978) (filing for recovery under the state worker's compensation system tolled the statute of limitations under the federal LHWCA action); *United Brands Co. v. Melson*, 594 F.2d 1068, 1071 (5th Cir.1979). The payments thus tolled the statute of limitations, and the Board's ruling is

AFFIRMED.

APPENDIX B

U.S. Department of Labor
Benefits Review Board
1111 20th St., N.W
Washington, D.C. 20036

BRB No. 88-196

CARL SMITH	)	**PUBLISHED**
Claimant-Respondent	)	FILED AS PART OF THE RECORD
v.	)	
UNIVERSAL FABRICATORS, INCORPORATED	)	MAY 31 1988 (date)
and	)	/s/ Linda M. Meekins Clerk of the Board Benefit Review Board
LOUISIANA GUARANTY ASSOCIATION FUND	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor.

Larry T. Richard (Cline, Miller & Richard) Rayne, Louisiana, for claimant.

Howard L. Murphy (Deutsch, Kerrigan & Stiles), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and TAIT, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (86-LHC-1924) of Administrative Law Judge Parlen L. McKenna awarding benefits on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The Board must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational, and are supported by the applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b) (3).

On April 30, 1982, claimant, while employed as a structural fitter for employer, injured his back when lifting a piece of floor grating which was to be installed on a fixed offshore oil drilling platform. As a result of this injury, claimant was hospitalized on several occasions and filed this claim for benefits under the Act. Claimant has also received disability benefits pursuant to the Louisiana Workers' Compensation Act since the date of the injury.

The parties stipulated to all issues in the case except the existence of jurisdiction pursuant to Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3) and 903(a), and the timeliness of the claim for benefits pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge concluded that claimant was injured on a covered situs and that he was engaged in maritime employment because he

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. III 1986).

found that claimant spent "at least some of [his] time" engaged in covered employment. *Northeast Marine Terminal Co., Inc., v. Caputo,* 432 U.S. 249, 6 BRBS 150 (1977). Although claimant was responsible for cutting and fitting pieces of metal to be used as component parts for fixed offshore oil drilling platforms during the last several months of his employment, he was also responsible for repairing and fabricating parts for drilling barges and other vessels used to lay down pipe at other times during his employment. Occasionally, claimant was also required to load and unload barges with finished parts. The administrative law judge accordingly concluded that the jurisdictional requirements of the Act were satisfied. He further found that claimant's claim for benefits was timely pursuant to Section 13(a) of the Act, since claimant was still receiving disability benefits pursuant to the Louisiana Workers' Compensation Act when his claim was filed.

On appeal, employer contends that the administrative law judge erred in determining that the evidence established that claimant was injured on a covered situs and was engaged in maritime employment pursuant to Sections 2(3) and 3(a). It further asserts that the payment of state compensation is not "payment of compensation without an award" which is contemplated by the provisions of Section 13(a).

In order to comply with the jurisdictional requirements under the Act, claimant must satisfy both the situs and status tests. *See Caputo, supra.* Section 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. §902(3). While "maritime employment" is not limited to the occupations specifically mentioned in this

section, the Supreme Court has recognized that the requirement is an "occupational test" which requires the employee to be engaged in tasks which are inherently maritime in nature and that it does not extend to workers who are injured on fixed offshore oil drilling platforms since their tasks are also performed by workers on land and are not significantly altered by the maritime enviornment. *See Herb's Welding Inc. v. Gray,* 470 U.S. 414, 105 S. Ct. 1421, 84 L.Ed.2d 406, 17 BRBS 78 (CRT) (1985). However, since this section focuses primarily on occupations, a claimant may not be excluded from coverage merely because he is not engaged in maritime employment at the moment of his injury, if he spends "at least some of [his] time" engaged in indisputably covered activities. *See Caputo, supra.*

In the instant case, the administrative law judge concluded that during the entire time in which claimant was employed by employer, he spent 103 days fabricating parts for fixed offshore oil drilling platforms and that these activities were not covered under the Act pursuant to the Supreme Court's decision in *Herb's Welding, supra.* He concluded, however, that claimant was also engaged in loading and unloading barges with component parts on at least 18 days of his employment and was responsible for repairing and building vessels and their component parts on 203 days of his employment. Pursuant to *Caputo, supra,* he then concluded that claimant spent "at least some of [his] time" engaged in covered activities and that the evidence satisfied the status requirement of the Act.

We affirm the administrative law judge's conclusion that claimant was an "employee" under the Act. Employer asserts that the administrative law judge was required to consider the nature of the work which claimant was performing when he was injured, how long he had been assigned

to the work, the sequence of work to which he was assigned immediately preceding the injury, and the fact that employer was not engaged in shipbuilding work on the day of the injury. Employer's arguments, however, neglect that claimant need not have been engaged in maritime activities at the time of the injury as long as he spent "at least some of [his] time" in covered activities in order to satisfy the status test. *See Caputo,* 6 BRBS at 165-66. *See also Odom Construction Co., Inc. v. United States Department of Labor,* 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied,* 450 U.S. 966 (1981). Additionally, employer's contention that the work performed on the Scan Drilling Barge constituted only a one-time project in maritime activity and should not have been considered by the administrative law judge ignores employer's regular involvement in loading and unloading component parts onto barges as well as its fabrication of scanners used on vessels designed to lay pipe. Since activities such as these have previously been found to constitute covered employment, *see generally Boudloche v. Howard Trucking Co., Inc.,* 632 F.2d 1346, 12 BRBS 732 (5th cir. 1980), *rev'g* 11 BRBS 687 (1979), *cert. denied,* 452 U.S. 915 (1981); *Howard v. Rebel Well Service,* 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980) *rev'g* 11 BRBS 568 (1979), claimant spent at least some of his time in indisputably longshoring operations and has therefore satisfied the status test of Section 2(3).[1]

In order to satisfy the situs requirement, claimant

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[1] On appeal, employer argues that claimant spent 13 days, rather than 18 days as the administrative law judge found, loading and unloading barges. Employer also contends that the administrative law judge erred in classifying 9 days claimant spent repairing the drilling tender component and installing barge bumpers as maritime activities. We need not address these contentions since these 14 days of alleged non-maritime activity are minimal and do not affect our determination that the administrative law judge properly concluded that claimant spent "at least some of [his] time" in activities covered under the Act.

must establish that he was injured on the "navigable waters of the United States . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. §903(a). The situs test simply requires that the general area in which the claimant is injured be customarily used for loading, unloading, repairing, or building a vessel, and does not require that the area be exclusively used for maritime purposes. *See Texports Stevedore Co. v. Winchester,* 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Jacksonville Shipyards, Inc. v. Perdue,* 536 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded,* 433 U.S. 904 (1977), *reaff'd,* 575 F.2d 79 (5th Cir. 1978), *cert. denied,* 440 U.S. 967 (1979).

In the instant case, claimant was injured while performing work upon a fixed offshore oil drilling platform which was being constructed in employer's yard. The administrative law judge noted that the yard adjoined navigable water and was used for the fabrication and repair of components for both fixed offshore oil drilling platforms and vessels used in the oil industry. He further found that the general area of employer's yard was also used for loading and unloading component parts onto barges. He accordingly concluded that claimant was injured on a covered situs despite the fact that his injury did not occur at the locus of employer's maritime activities. Although employer contends that its involvement in maritime activities was "infrequent," "incidental," and insignificant, its yard was customarily used for its loading and unloading activities, as well as for its fabrication and repair of parts for vessels in addition to its platform work. We accordingly affirm the administrative law judge's conclusion that claimant was injured on a covered situs and is therefore covered under the Act.

Employer next contends that the administrative law judge erred in determining that claimant's claim was timely filed, since he was still receiving disability benefits pursuant to the Louisiana Workers' Compensation Act when his claim was filed. Employer contends that "compensation," as contemplated by Section 13(a), is limited to payments made under the Act pursuant to Section 2(12), which defines "compensation" as money payable "as provided for in this Act." 33 U.S.C. §902(12).

Section 13(a) provides that the right to compensation for disability under the Act is barred unless a claim is filed within a year after the injury. Additionally "[i]f payment of compensation has been made without an award," a claim may be filed within one year after the date of the last payment. In *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1978), the Board recognized that Section 13 was designed to insure fairness to the employer by preventing the revival of stale claims in cases in which evidence has been lost, memories have faded, and witnesses have disappeared. However, since an employer who pays a claimant benefits pursuant to a state workers' compensation statute is fully aware of the claimant's injured condition, the Board held that such payments toll the running of the statute of limitations, since these purposes of Section 13 would not be served by barring the claim. *Id.*

In the instant case, claimant was still receiving state worker's compensation benefits when his claim was filed under the Act. Additionally, employer, with full knowledge of the injury, chose to pay claimant pursuant to the Louisiana statute. Since the purposes sought to be achieved by Section 13(a) would not be furthered by barring this claim under these circumstances, we reject employer's contentions and affirm the administrative law judge's conclusion that the claim was timely filed pursuant to *Saylor, supra.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

/s/ R P Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY

/s/ Reid C. Tait
REID C. TAIT
Administrative Law Judge

Dated this 31st
day of May 1988

APPENDIX C

U.S.Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504)589-6201

In the Matter of	
CARL SMITH Claimant	
v.	Case No. 86-LHC-1924
UNIVERSAL FABRICATORS, INC. Employer	OWCP No. 7-99008
and	
LA. GUARANTY ASSOC. FUND Carrier	

Larry T. Richard, Esq.
PO Drawer 29
Rayne, Louisiana 70578
For the Claimant

Howard L. Murphy, Esq.
Deutsch, Kerrigan & Stiles
755 Magazine St.,
New Orleans, Louisiana 70130
For the Employer /Carrier

Before: PARLEN L. MCKENNA
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act), and the governing regulations thereunder, filed by Carl Smith, Claimant, against Universal Fabricators, Inc., Employer, and Louisiana Guaranty Association, Carrier. A hearing was held in Metairie, Louisiana, on April 8, 1987. All parties were afforded full opportunity to submit evidence and argument.

STIPULATIONS

At the outset of the hearing, the parties stipulated, and I so find:

1. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

2. That Claimant was injured on April 30, 1982;

3. That Claimant was in the course and scope of his employment;

4. That Claimant gave timely notice of the injury to Employer;

5. That Employer filed a timely notice of controversion of the claim;

6. That compensation benefits were paid to Claimant at the rate allowed by the Louisiana Workers' Compensation Act, $183.00 per week for a total of $45,933.00 to date of hearing;

7. That Claimant's average weekly wage was $458.51;

8. That Claimant is now and has been since April 30, 1982, disabled;

9. That all medical benefits have been paid.

ISSUES

The issues unresolved in this proceeding are:

1. Jurisdiction under the Act;

2. Whether the claim was timely filed.

FACTS

Claimant, who was 33 years old at the time of the hearing and has a twelfth grade education, injured his back while in the course of his employment on April 30, 1982. The injury occurred when Claimant hurt his back while attempting to set down a piece of floor plating. There is no dispute that Claimant is totally and permanently disabled (Tr. 18).

Claimant was hired by Employer on January 28, 1981. He worked as a structural fitter from that date until

he was injured, except for a period of about three weeks in the summer of 1981 when he worked as a pipefitter. His work as a structural fitter involved primarily cutting pieces of metal to be used for components of fixed offshore platforms and vessels.

While working for Employer, Claimant worked all or part of 126 days on a project to build a drilling barge for Scan-Drill. He spent all or part of 66 days fabricating stingers, devices to be attached to vessels that are designed to lay pipe in the Gulf of Mexico. He spent all or part of 5 days repairing a component of a drilling tender, and all or part of 4 days "installing rubber bumpers on barge bumpers." He also spent all or part of 2 days fabricating a walkway for a jack-up barge. All or part of 103 days was spent building or repairing components for fixed platforms.

Company records show that Claimant worked loading barges for 5 days. Claimant testified, however, that this figure is greatly underestimated. Claimant testified that the foremen fill out the daily input forms and that the records are not accurate. Claimant estimated that he worked on loading out operations for two months. At the hearing, Claimant testified as to at least 18 days that he worked on loading operations.

Claimant has not worked since April 30, 1982, the date of the accident. Claimant has received weekly compensation benefits under the Louisiana Workers' Compensation Act from the date of injury to the date of the hearing. Claimant filed his claim for compensation under the Longshore and Harbor Workers' Compensation Act on February 22, 1985.

DISCUSSION, FINDINGS AND CONCLUSIONS OF LAW

The threshold question to be resolved is that of

jurisdiction under the Act. A worker claiming under the Act must satisfy both a "situs" and a "status" test to obtain coverage. *Herb's Welding, Inc. v. Gray,* 105 S.Ct. 1421, 1423 (1985). I note that Section 20(a) is not applicable to this issue. *Sedmak v. Perini North River Associates,* 9 BRBS 378, 383 (BRB 1979), *affirmed,* 622 F.2d 1111 (2nd Cir. 1980), *cert. den.,* 449 U.S. 1131 (1981); *Broussard v. Waukesha Pearle Industries,* 13 BRBS 37, 39 (BRB 1980). It is noteworthy that the Supreme Court has held that Claimant need not be engaged in maritime employment at the time of injury so long as he satisfies the "status" and "situs" tests.

The situs test included in Section 3(a) of the Act provides that an employee is on a covered situs,

> . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading,* unloading, repairing, dismantling, or building a *vessel* (emphasis added)).

The situs requirement simply mandates that the general area where a claimant is injured be customarily used for loading, unloading, repairing, dismantling, or building a vessel, and does not require the specific locus of the injury to be in such a place. *Sawyer v. Tideland Welding Services,* 16 BRBS 344, 346 (BRB 1984); *Texports Stevedore Co. v. Winchester,* 632 F.2d 504, 515-516 (5th Cir. 1980), *cert. den.,* 452 U.S. 905 (1981).

In the instant case, Employer's yard adjoined the navigable waters of the United States. Employer's business involved the fabrication and repair of components

for fixed offshore platforms and vessels. After fabrication, the components are normally loaded onto barges at Employer's yard and shipped to where they are needed. Employer undertook the responsibility of loading completed components onto the barges by using its own employees to load. Claimant sustained his injury inside the fabrication area on Employer's yard. The injury did not occur at the locus of a maritime activity; however, the general area of Employer's fabrication yard was used for the maritime purpose of loading barges. Accordingly, I find that Claimant was injured upon a covered situs.

It is also necessary for Claimant to satisfy the status test of Section 2(3) of the Act. Section 2(3) provides, in pertinent part:

> The term "employee" means any person engaged in *maritime employment*, including any longshoreman or the person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . . (emphasis added).

The "maritime employment" requirement is an occupational test focusing on loading and unloading. *Herb's Welding, Inc., supra,* at 1427, citing *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 80 (1979). Persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered. *Herb's Welding, Inc., supra,* at 1427; *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 267 (1977). However, persons who spend at least some of their time in indisputably longshoring operations are considered "longshoremen" and are covered. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979). Hence, a finding of coverage under the Act does not exclusively depend on whether an employee's task at a

given moment is clearly a longshoring operation. *Northeast Marine Terminal Co., Inc., supra,* at 273. The "status" test can thus be satisfied either by the activity at the time of injury or by the nature of overall employment. *Hillinghorst Industries, Inc. v. Carroll,* 605 F.2d 750, 754 (5th Cir. 1981); *Spencer v. Baker Argricultural Co.,* 16 BRBS 205, 207 (BRB 1984).

The United States Supreme Court in *Herb's Welding, Inc. v. Gray, cited supra,* held that Gray, a welder performing work on a fixed platform in territorial waters, was not engaged in "maritime employment." Gray's welding work was found to be unrelated to loading or unloading, and to be far removed from traditional LHWCA activities. The Supreme Court emphasized there was nothing inherently maritime about building and maintaining pipelines and platforms whether done on land or at sea.

I find that Claimant worked all or part of at least 221 days in activities covered by the Act while under Employer's employment. During the same period, Claimant only worked all or part of 103 days in activities not covered by Section 2(3). I find that Claimant worked all or part of at least 18 days engaged in loading or unloading vessels, and 203 days engaged in the repair and building of vessels and components of vessels. I find it clear that Claimant has met the test of *Caputo, supra,* of spending at least some of his time in covered activities.

I have found that Claimant has met both the "status" and "situs" tests of jurisdiction under the Act. Therefore, he is covered under the Act.

Employer next contends that Claimant's claim for benefits is prescribed because it was not timely filed in accordance with Section 13 of the Act. In *Saylor v. Ingalls*

Shipbuilding, Inc., 9 BRBS 561 (1978) (Smith, S., dissenting), the Board held that payments made by employer under the state workmen's compensation act constituted payment of compensation as defined in Section 13(a) so as to toll the running of the one year statute of limitations. The majority also noted that the purpose of the Section 13 statute of limitations which is to prevent the revival of stale claims where evidence has been lost, memories have faded, and witnesses have disappeared would not be saved by barring the claim in the factual pattern before it. *See Belton v. Traynor,* 381 F.2d 82 (4th Cir. 1967). As Claimant was still receiving benefits under the Louisiana Workers' Compensation Act when he filed his claim under the Act, I find it to be timely.

There was much discussion at the hearing as to whether the Employer had waived his right to raise the issue of timeliness of filing by failing to bring it up at the deputy commissioner level. As I have found that the filing was timely, the point is moot.

Interest is assessed on past due benefits to insure that a claimant receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part sub nom.; Newport News Shipbuilding & Dry Dock Co., v Director, OWCP,* 594 F.2d 986 (4th Cir. 1979). With the same concern to insuring uniformity under the Act, the Benefits Review Board has now adopted the interest rate used by the U.S. District Courts under 28 U.S.C. §1961 (1982). This has been followed in the case of *Grant v. Portland Stevedoring Co.,* BRB No. 81-406, OALJ No. 80-LHCA-1442-S (June 15, 1984). The statute, known as the Federal Courts Improvement Act, provides in relevant part:

[a] . . . [S]uch interest shall be calculated from the

> date of entry of the judgment at a rate equal to the coupon issued yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week United States treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the Court shall distribute notice of that rate and any changes in it to all federal judges.

Interest on past due benefits outstanding shall be computed on the foregoing basis. *Grant v. Portland Stevedoring Co., on reconsideration*, BRB No. 81-406 (January 15, 1985).

Claimant's attorney, having successfully represented him herein, is entitled to an attorney's fee to be assessed against the Employer. Within 20 days of the receipt of this Order, Claimant's attorney shall file a fully supported and fully itemized application complying with the requirements of Section 28 of the Act and the implementing regulations concerning those necessary and reasonable services rendered and costs necessarily incurred after referral of this proceeding to the Office of Administrative Law Judges. A copy of the application must be served on opposing counsel who shall then have 10 days to respond with objections thereto.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicabale to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay to Claimant compensation for permanent total disability commencing April 30, 1982, and continuing thereafter, based on an average weekly wage of $458.51, subject to the annual adjustments required by Section 10(f) of the Act, less compensation previously paid to the Claimant.

2. Employer/Carrier shall continue to furnish such reasonable and necessary medical care and treatment as the claimant's work-related injury of April 30, 1982, may require.

3. Employer/Carrier shall receive credit for all compensation previously paid to Claimant pursuant to the Act and his Louisiana worker's compensation claim as a result of his injury of April 30, 1982.

4. Employer/Carrier shall pay to the Claimant interest in accordance with 28 U.S.C. §1961 on all past due benefits outstanding.

5. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

/s/ Parlen L. McKenna

PARLEN L. MCKENNA
Administrative Law Judge

Dated: JAN 08 1988
Metairie, Louisiana

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APPENDIX D

Memorandum of Informal Conference
(under the Longshoremen's and Harbor Workers' Compensation Act, As extended)

U.S. Department of Labor
Employment Standards Administration

1. Claimant	2. OWCP File Number
Carl Smith	7-99008
3. Employer	4. Carrier/Employer's Number
Universal Fabricators	
5. Insurance Carrier	
6. Date of Conference (Month, day, year)	7. Date of Injury (Month, day, year)
5/7/86	4/30/82

8. Appearances:

☒ Claimant present ☐ Claimant not present

For Claimant Larry T. Richard, Esq. For Employer/Carrier Howard L. Murphy, Esq.

Issues:

Jurisdiction

9. The claimant sustained/alleges an accidental injury on the date in Item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 et seq.) or an extension thereof, resulting in the following injury/ies:

Back

10. Prior conferences were held on N/A
the employer/carrier have paid compensation for this injury in the amount of $ _____
for the following periods:

Paid State benefits from April 30,1982 and continuing at $183.00 per week.

11. Present Claim:

Majority of claimant's duties are working on barges or loading or unloading barges.

12. Employer/Carrier's Position

Claimant working as a pipe fitter at time of accident. Claimant is a non base worker.

13. Average Weekly Wage (Section 10) $ _____	14. Compensation rate (2/3 x AWW)
☐ As stipulated by parties ☐ As recommended by examiner	

Form L-21K
Sept 1983

15. Claimant

- ☐ Returned to work on
- ☒ Has not returned to work
- ☐ Did not lose time

16. Medical costs relate the injury

- ☒ Have been paid by the employer
- ☐ Have not been paid

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows:

After discussion between the parties, appears claimant is not covered under the Longshore & Harbor Workers' Compensation Act.

FEE

Approved Fee: N/A

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee (to include expenses) is approved in favor of:

- ☐ This fee is for an attorney and is made a lien on the compensation recommended.
- ☐ There is no lien on the compensation.
- ☐ The fee is to be assessed to the employer or carrier.

ACTION BY EMPLOYER/CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendations. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

Evelyn M. Leggitt

EVELYN LEGGITT
(Claims Examiner)

May 22, 1986
(Date this memorandum issued)

(See 20 C.F.R. 701 et seq. for LHWC Act Regulations)

☆ U.S. Government Printing Office: 1983—421-471/0000

No. 89-711

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNIVERSAL FABRICATORS, INC., PETITIONER

v.

CARL SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

ANNE PAYNE FUGETT
Attorney
Department of Labor
Washington, D.C. 20210

16 pp

QUESTIONS PRESENTED

1. Whether an employee engaged as a structural fitter who spent a significant portion of his work time in activities expressly included in the statutory definition of maritime employment—the loading or unloading of vessels and the repair and building of vessels—was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3) (1982 & Supp. V 1987).

2. Whether a yard adjoining navigable waters and used for the loading and unloading of vessels, as well as for the fabrication and repair of components for vessels and fixed offshore oil drilling platforms, is a covered situs under Section 3(a) of the LHWCA, 33 U.S.C. 903(a) (1982 & Supp. V 1987).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

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UNIVERSAL FABRICATORS, INC., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 878 F.2d 843. The decision of the Benefits Review Board (Pet. App. A9-A16) is reported at 21 Ben. Rev. Bd. Serv. (MB) 83. The decision of the administrative law judge (Pet. App. A17-A26) is reported at 20 Ben. Rev. Bd. Serv. (MB) 707 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1989, and the petition for a writ of certiorari was filed on October 30, 1989 (a Monday).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Universal Fabricators, Inc., employed respondent Carl Smith from January 1981 to April 1982, primarily as a structural fitter who cut pieces of metal for use in building seagoing vessels and fixed offshore oil drilling platforms. During the course of his employment, Smith spent 126 days constructing a drilling barge, 66 days fabricating "stingers" (devices attached to vessels that lay pipe beneath the sea), five days repairing a component of a drilling tender, four days installing rubber bumpers on barge bumpers, two days constructing a walkway for a "jack-up" barge, at least five days loading barges, and 103 days building and repairing components for fixed offshore oil drilling platforms. Smith performed all his employment duties at petitioner's yard, which adjoined navigable waters. Pet. App. A2-A3, A10-A11, A19-A21.

On April 30, 1982, Smith suffered a back injury in petitioner's yard while placing a piece of floor plating that was to be installed on a fixed offshore oil drilling platform. As a result of the accident, Smith was totally and permanently disabled, and he has not worked since the date of the injury. Subsequently, on February 22, 1985, he filed a claim for compensation with respondent Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Pet. App. A2-A3, A10, A19-A20.

2. The ALJ found that Smith satisfied the statutory eligibility requirements and awarded him benefits. Pet. App. A17-A26. The principal issues before the ALJ were whether the "status" and "situs" re-

quirements for coverage under Sections 2(3) and 3(a) of the Act were met. See 33 U.S.C. 902(3), 903(a) (1982 & Supp. V 1987).[1] After a hearing, the ALJ found that during the 15 months of Smith's employment with petitioner, he "worked all or part of at least 221 days in activities covered by the Act," *i.e.*, loading and unloading vessels and repairing and building vessels and their components. Pet. App. A23. The ALJ further determined that Smith had spent 103 days in non-covered tasks, *i.e.*, fabricating parts for fixed offshore oil drilling platforms. *Ibid.*, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985). Relying on *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), the ALJ held that because Smith spent "at least some of his time in covered activities," he satisfied the status requirement, even though he was not engaged in maritime employment at the time of his injury. Pet. App. A23.

The ALJ also concluded that Smith sustained his injury on a covered situs, finding that petitioner's yard "adjoined the navigable waters of the United States" and that after fabrication, the components for vessels and oil drilling platforms were customarily loaded onto barges for shipping at petitioner's yard. Pet. App. A21-A22. Noting that "the situs requirement simply mandates that the general area

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[1] Petitioner also contended that Smith's claim was untimely under Section 13 of the LHWCA, 33 U.S.C. 913 (1982 & Supp. V 1987). The ALJ rejected that contention on the ground that Smith's receipt of payments under the state workers' compensation act tolled the LHWCA's statute of limitations. Pet. App. A24. That ruling was affirmed by the Benefits Review Board (*id.* at A15) and the court of appeals (*id.* at A7-A8), and is not challenged in the petition for a writ of certiorari.

where a claimant is injured be customarily used for loading, unloading, repairing, dismantling, or building a vesel, and does not require the specific locus of the injury to be in such a place" (*id.* at A21), the ALJ determined that although the injury "did not occur at the locus of a maritime activity[,] * * * the general area of [petitioner's] fabrication yard was used for the maritime purpose of loading barges." *Id.* at A22.

3. The Benefits Review Board affirmed. Pet. App. A9-A16. The Board first rejected petitioner's argument that in determining whether Smith was engaged in maritime employment, the ALJ should have considered "the nature of the work which claimant was performing when he was injured, how long he had been assigned to the work, the sequence of work to which he was assigned immediately preceding the injury, and the fact that the employer was not engaged in shipbuilding work on the day of the injury." *Id.* at A12-A13. The Board explained that petitioner's "arguments * * * neglect that claimant need not have been engaged in maritime activities at the time of the injury as long as he spent 'at least some of [his] time' in covered activities" (*id.* at A13, quoting *Northeast Marine Terminal*, 432 U.S. at 273). The Board was unpersuaded by petitioner's contention that Smith's work constructing a drilling barge was merely a one-time project in maritime activity, because it ignored his other involvement in "loading and unloading component parts onto barges as well as his fabrication of scanners [stingers]," activities similar to those previously characterized as maritime by the Fifth Circuit. *Ibid.*, citing *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981), and *Howard* v. *Rebel Well Service*, 632 F.2d 1348 (5th Cir. 1980).

The Board also agreed with the ALJ's situs determination, Pet. App. A14, observing that "[t]he situs test simply requires that the general area in which claimant is injured be customarily used for [maritime tasks], and does not require that the area be exclusively used for maritime purposes." *Ibid.* Accordingly, in the Board's view, the ALJ properly held that "claimant was injured on a covered situs despite the fact that his injury did not occur at the locus of [petitioner's] maritime activities." *Ibid.*

4. The court of appeals affirmed the Board's ruling. Pet. App. A1-A8. The court first concluded that substantial evidence supported the finding that Smith spent a "significant portion of [his] time * * * in indisputably longshore operations," and therefore met the Act's status requirement. *Id.* at A5. Rejecting petitioner's reliance on *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), which indicated that an employee must actually have been performing or been directly involved in maritime employment at the time of the injury, the court noted that this Court's subsequent decision in *Northeast Marine Terminal*, as well as later Fifth Circuit decisions, establish that the LHWCA's coverage includes "persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." Pet. App. A4-A5 (emphasis omitted), quoting 432 U.S. at 273. The court also affirmed the Board's situs determination, based on the ALJ's finding that petitioner "was engaged in maritime activities in an area adjoining the water." *Id.* at A6. The court rejected as "overbroad," and contrary to the express language of Section 3(a), petitioner's contention that the Act's protection should not extend to land-based workers such as Smith. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. In 1972, Congress extended the coverage of the LHWCA in order "to protect additional workers." S. Rep. No. 1125, 92d Cong., 2d Sess. 1 (1972). Congress first modified the Act's "situs" requirement by extending coverage shoreward. It thus expanded the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a) (1982 & Supp. V 1987), to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. 381, 385 (1989).

At the same time, Congress amended the definition of "employee" in Section 2(3), 33 U.S.C. 902(3) (1982 & Supp. V 1987), to describe affirmatively the class of workers in that area eligible for benefits. Congress accordingly added the requirement that the injured worker be "engaged in maritime employment," which it defined to "includ[e] any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker * * *." See *Northeast Marine Terminal*, 432 U.S. at 263-264. Applying this two-prong test for LHWCA coverage, the court of appeals correctly held that Smith satisfied the statutory requirements.

2. The court of appeals properly sustained the conclusion of both the ALJ and the Benefits Review Board that Smith was "engaged in maritime employ-

ment" within the meaning of Section 2(3). Smith worked for petitioner for approximately 15 months. The ALJ found that Smith spent a considerable part of this period in "loading or unloading vessels, and * * * in the repair and building of vessels and components of vessels" (Pet. App. A23), activities enumerated as "maritime employment" in the Act. See 33 U.S.C. 902(3) (1982 & Supp. V 1987). Petitioner does not dispute this finding.[2] It instead argues (Pet. 6-9) that the determination that a worker is covered if he performed maritime tasks for a portion of his work time, even though he was not engaged in a maritime activity at the moment of injury, conflicts with this Court's decisions in *Northeast Marine Terminal* and *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985), and with the decisions of other courts of appeals. This argument is without merit.

The court of appeals' decision is clearly consistent with *Northeast Marine Terminal*. There, in examining the landward reach of the 1972 LHWCA amendments for the first time, the Court considered the claims of two workers: a "checker," who was responsible for checking and recording cargo as it was loaded or unloaded, and a longshoreman, who at the time of injury was working as a "terminal laborer" helping to load discharged cargo into trucks. The Court held that the checker satisfied the status requirement because his checking the contents of a container on shore on the day of the accident was "an integral part of the unloading process as altered by the advent of containerization." 432 U.S. at 271. The Court further held that the terminal laborer met

[2] In the court of appeals, petitioner likewise did not challenge the ALJ's and the Board's conclusion that a portion of Smith's employment had been spent in maritime activities.

the status test because he spent at least some of his time in "indisputably longshoring operations." *Id.* at 273. In the Court's view, the Act's "focus on occupations and its desire for uniformity" supported continuous coverage for workers under the LHWCA. *Id.* at 276. See also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 n.18 (1979) (citing with approval "the holding of *Northeast Marine Terminal* * * * that a worker is covered if he spends some of his time in indisputably longshoring operations").

Just this Term, Justice Blackmun, in a concurring opinion joined by Justices Marshall and O'Connor, confirmed the continuing validity of this "amphibious worker" doctrine articulated in *Northeast Marine Terminal* and *Ford*. In *Chesapeake & Ohio Ry.* v. *Schwalb*, the Court held that two terminal workers injured while engaged in janitorial tasks during the ship-loading process, and a pier machinist injured while repairing loading equipment, were "employees" covered by the LHWCA because they were injured while performing tasks essential to the process of loading ships. 110 S. Ct. at 385-386. In joining the Court's opinion, Justice Blackmun wrote separately to stress that "[i]n light of *Northeast Marine Terminal Co.*, * * * it is not essential to [the Court's] holding that the employees were injured while actually engaged in these tasks. They are covered by LHWCA even if, at the moment of injury, they had been performing other work that was not essential to the loading process." 110 S. Ct. at 386. Noting that a purpose of the 1972 amendments was "to solve the problem that under the pre-1972 Act employees would walk in and out of LHWCA coverage," Justice Blackmun stated that to limit coverage to employees who are performing maritime work at the

moment of injury "would bring the 'walking in and out of coverage' problem back with a vengeance." *Id.* at 386-387.[3]

Nor does the court's resolution of the status issue conflict with any decision of another circuit. The appellate courts uniformly have held that workers who spend at least some of their time in undeniably maritime activities, although not engaged in such activities at the moment of injury, are employees for purposes of the Act. *Browning* v. *B.F. Diamond Construction Co.*, 676 F.2d 547, 548 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140 (9th Cir. 1978); *Stockman* v. *John T. Clark & Son, Inc.*, 539 F.2d 264, 274 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). The decisions cited by petitioner (Pet. 6-7) simply do not address this issue. Instead, they consider whether the injured worker performed any maritime duties at all.[4] None articulates a rule that

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[3] Petitioner's reliance (Pet. 9-10) on *Herb's Welding* is misplaced. There, the Court held that a person whose work consisted solely of welding a gas flow line on a fixed offshore drilling platform was not "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA. 470 U.S. at 425-426. But neither the Board nor the court below relied on Smith's building and repairing of fixed platform components as establishing his maritime employment. Rather, they correctly relied on his other, indisputably maritime activities to establish that he spent at least a portion of his time in covered employment. See Pet. App. A2-A3, A5, A12.

[4] See *Sanders* v. *Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir. 1988) ("responsibilities as a Labor Relations Assistant satisfy the status test"); *General Dynamics Corp.* v. *Sacchetti*, 681 F.2d 37, 39 (1st Cir. 1982) ("the tasks at issue are a necessary incident to the fabrication of a ship," and therefore are covered); *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980)

a worker must be engaged in a maritime task at the time of his injury.[5]

3. The court of appeals' conclusion that Smith's injury occurred on a covered situs also comports fully with the statutory test. Under the LHWCA, benefits are payable for "an injury occurring upon the navigable waters of the United States (including any * * * adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel)." 33 U.S.C. 903(a) (1982 & Supp. V 1987). Smith was injured at petitioner's yard, which the ALJ found "adjoined the navigable waters of the United States." Pet. App. A21. The

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("activities had nothing significant to do with navigation or with commerce on navigable waters," and therefore were not covered), cert. denied, 449 U.S. 1131 (1981); *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) ("nature of [worker's] duties may not have been fully developed on the record, thereby leaving the question of LHWCA status open for resolution"); *Dravo Corp.* v. *Banks*, 567 F.2d 593, 595 (3d Cir. 1977) (worker's "duties have no traditional maritime characteristics," and therefore are not covered); *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975) (it is "illogical to think of [employee's] work and duties at or on an upland sawmill's log pond as 'maritime employment' "), cert. denied, 429 U.S. 868 (1976).

[5] Petitioner apparently perceives a circuit conflict because it misapprehends the decision below. Contrary to petitioner's assertions (Pet. 5-7), the court simply did not address the question whether a land-based worker who is *not* engaged in one of the enumerated occupations in Section 2(3) must be "directly involved" in or have a "realistically significant relationship to" traditional maritime activities. That is because Smith unquestionably performed some work that is expressly included in the enumeration of occupations in Section 2(3): longshoring and ship building and repairing. Pet. App. A5. See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. at 385.

ALJ further determined that Smith sustained his injury in the fabrication area of the yard, where components for both vessels and fixed offshore oil drilling platforms were made and repaired, and that "the general area of [petitioner's] fabrication yard was used for the maritime purpose of loading barges." *Id.* at A22. The Board affirmed, likewise concluding that petitioner's "yard was customarily used for its loading and unloading activities, as well as for its fabrication and repair of parts for vessels in addition to its platform work." *Id.* at A14. The court of appeals' situs ruling rests on these findings. See *id.* at A6.

Petitioner appears to challenge (Pet. 10) the court of appeals' situs determination solely on the ground that an oil drilling platform situated in the yard was the precise location of Smith's injury and that such a platform does not meet the Act's situs requirement. This contention misapprehends the statutory scheme. By the terms of Section 3(a), the focus of the Act is on the "area" in which the injury occurred (here, petitioner's yard), not on any particular piece of equipment within that "area." See *Northeast Marine Terminal*, 432 U.S. at 280-281.[6] Any other inquiry would be illogical and contravene the settled rule that the LHWCA " 'must be liberally construed in conformance with its [remedial] purpose, and in a way which avoids harsh and incongruous results.' " *Northeast Marine Terminal*, 432

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[6] Petitioner errs in arguing (Pet. 9-10) that *Herb's Welding* is to the contrary. In that case, the Court held that a welder on an offshore drilling platform was not covered by the LHWCA because he did not have the status of an "employee" within the meaning of the Act, not because such a platform could never be a covered situs. See 470 U.S. at 425.

U.S. at 268, quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). Because petitioner does not dispute that the yard itself was an "adjoining area," and therefore a covered situs for purposes of the LHWCA, the court of appeals' holding to that effect does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

ANNE PAYNE FUGETT
Attorney
Department of Labor

JANUARY 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 705